Office-Supreme Court, U.S.
FILED
MAR 5 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-168.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1982.

NATIONAL LABOR RELATIONS BOARD,
PETITIONER,

v.

TRANSPORTATION MANAGEMENT CORP.,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Supplemental Brief for the Transportation Management Corp.

MARTIN AMES,
(Counsel of Record)
7 Fletcher Street,
P.O. Box 251,
Chelmsford, Massachusetts 01824.
(617) 256-8115

ADDISON C. GETCHELL & SON, INC. - THE LAWYERS' PRINTER - BOSTON

Introduction.

Pursuant to Supreme Court Rule 35.5, the Respondent, Transportation Management Corp., respectfully submits this supplemental brief in light of the recent decision of *NLRB v. New York University Medical Center*, No. 450, slip. op. (2d Cir. Jan. 21, 1983). The first publication of the case appeared in the Bureau of National Affairs Daily Labor Report on February 4, 1983 and was received by counsel for the Respondent on February 8, 1983. [1983] 25 Daily Lab.Rep. (BNA) D-1-D-10 (Feb. 4, 1983). Since this decision came to the attention of the Respondent subsequent to January 31, 1983 - the date of the Respondent's brief, the case qualifies as a late authority under the Supreme Court Rules and entitles the Respondent to file a supplemental brief on the merits. Supreme Ct. R. 35.5. The Respondent respectfully requests that the Court consider the Second Circuit court decision in resolving the question pending before the Court.

* copy lodged

Table of Contents.

Introduction	i
Table of Contents	ii
Table of Authorities	iii
Argument	1
Conclusion	7

Table of Authorities.

CASES.

American Tobacco Co. v. Patterson, ___ U.S. ___, 102 S.Ct. 1534 (1982) 7

Behring International, Inc. v. NLRB, 675 F.2d 83 (3d Cir. 1982) 7

NLRB v. American Geri-Care, Inc., No. 180, slip. op. (2d Cir. Dec. 23, 1982) 3

NLRB v. Chas. Batchelder Co., 646 F.2d 33 (2d Cir. 1981) 3

NLRB v. New York University Medical Center, ___ F.2d ___, No. 450, slip. op. (2d Cir. Jan. 21, 1983) *Passim*

NLRB v. Transportation Management Corp., 674 F.2d 130 (1st Cir. 1982) 5

NLRB v. Webb Ford Inc., 689 F.2d 733 (7th Cir. 1982) 7

NLRB v. Wright Line, A Div. of Wright Line, Inc., 662 F.2d 899 (1st Cir. 1981) 7

Piper v. Chris Craft Industries, Inc., 430 U.S. 1 (1977) 7

Scripps-Howard Radio v. F.C.C., 316 U.S. 4 (1972) 7

Wright Line, a Div. of Wright Line, Inc., 251 N.L.R.B. 1083 (1980) 5

Zurn Industries v. NLRB, 680 F.2d 683 (7th Cir. 1982) 6

STATUTE.

29 U.S.C. § 160 (c) 2

RULE.

Supreme Court Rule 35.5 i

No. 82-168.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1982.

NATIONAL LABOR RELATIONS BOARD,
PETITIONER,

v.

TRANSPORTATION MANAGEMENT CORP.,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT.

Supplemental Brief for the Transportation Management Corp.

Argument.

A. THE PLAIN MEANING OF SECTION 10(C) OF THE NATIONAL LABOR RELATIONS ACT SUPPORTS THE DECISION OF THE COURT BELOW THAT THE BURDEN OF PERSUASION NEVER SHIFTS TO THE EMPLOYER IN A SECTION 8(A)(3) DUAL MOTIVE DISCHARGE ACTION.

Section 10(c) of the National Labor Relations Act (Act) provides in pertinent part:

> . . . If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: . . .

29 U.S.C. § 160(c).

In a well reasoned and thorough analysis of Section 10(c) of the Act, the United States Court of Appeals for the Second Circuit recently renounced the procedural burden-shifting element of the Board's *Wright Line* test in *NLRB v. New York University Medical Center*, No. 450, slip. op. (2d Cir. Jan. 21, 1983). In accordance with the result reached by the court below in the instant case, the Second Circuit court held that the burden of persuasion never shifts to the employer. Slip. op. at 1341, 1356.[1] In rejecting the validity of the Board's

[1] In *N.Y.U. Medical*, dissident members of a hospital union, initiated a leafletting drive among Medical Center employees asking for their votes in an upcoming union election. The leaflets accused N.Y.U. Medical Center management of using "racist" and "fascist" tactics to intimidate Black and Hispanic workers. Slip. op. at 1342-1345. Three employees involved in the leafletting were issued warning letters. Two of the employees were suspended for their involvement in distributing the leaflets and for picketing, one of whom was discharged for similar reasons. *Id.* at 1345-1346. The General Counsel for the NLRB filed a complaint alleging that the Center's disciplinary measures violated Section 8(a)(1) of the Act. The Administrative Law Judge and the Board found the Medical Center's disciplinary measures violated Section 8(a)(1) since the employees were engaged in protected leafletting activity. The Board, however, did not determine whether the picketing was protected activity or more importantly, whether the Center would have pursued the same course of action in the absence of the protected leafletting activity. The Board entered a cease and desist order against the Center mandating: reinstatement with back pay for the discharged employee; compensation for losses sustained by

Wright Line test, Judge Timbers writing for the court commented: "We agree that shifting the burden of persuasion to the employer frustrates the balance between the employer and employee rights struck in the Act." *Id.* at 1356.[2]

The Second Circuit court decision is instructive in determining the proper allocation of burdens of proof under the Act.[3] First, the *N.Y.U. Medical* decision is in harmony with the position taken by the Respondent that the Board misallocated the burdens of proof under Section 8 of the Act. (Resp. Brief 27). Noting that the resolution of the burden of proof issue is a matter of statutory interpretation proper for the courts, rather than the Board to resolve, the court stated:

> At the outset of our analysis, we note that deciding the proper allocation of burdens is not within the Board's special competence "of applying the general provision of the Act to the complexities of industrial life . . . and of '[appraising] carefully the interests of both sides of any labor-management controversy in the diverse circumstances of the particular case' " *Ford Motor Co. v. NLRB*, 441 U.S. 488, 496 (1979) (citations omitted). Rather, the issue presented is a matter of statutory interpretation deserving greater scrutiny: "questions of statutory interpretation, especially when arising in the

---

the suspensions; and rescission of the warning letters. *Id.* at 1347. The court, consistent with its decision, remanded the case to determine whether the Board would have reached the same result had it properly imposed a burden of production on the employer. *Id.* at 1369-70.

[2] Prior to the *N.Y.U. Medical* decision, the Second Circuit court had not determined the applicability of the Board's *Wright Line* test to unfair labor practice violations within the circuit. *See NLRB v. American Geri-Care, Inc.* No. 180, slip. op. (2d Cir. Dec. 23, 1982); *NLRB v. Chas. Batchelder Co.*, 656 F.2d 33, 38-39 (2d Cir. 1981).

[3] If the *N.Y.U. Medical* decision had been available before the Respondent's Brief on the Merits was filed, the argument contained herein would have appeared on page 23 of the Respondent's brief.

> first instance in judicial proceedings, are for the courts to resolve, giving appropriate weight to the judgment of those whose specific duty it is to administer the questioned statute" *NLRB v. Hearst Publications, Inc.*, 322 U.S. 444, 430-31 (1944) [citations omitted]. Especially when the contested interpretation implicates an explicit provision in the governing statute, we accord limited deference.

Id. at 1357-58. Consistent with the reasoning of the Second Circuit court, this Court should give limited deference to the Petitioner's proof scheme for dual motive actions.

Under its judicial authority to interpret and construe statutes, the Second Circuit court next focused on the plain meaning of Section 10(c) and concluded that "[t]he plain language of the statute indicates that the General Counsel must prove by a preponderance of the evidence that the employer violated the Act". *Id.* at 1359. In line with the position taken by the Respondent, (Resp. Brief 21-22) the court found the Board's *Wright Line* test at odds with traditional evidentiary principles. *Id.* at 1359-60. Referring to Deans Wigmore and McCormick, Judge Timbers averred:

> [T]he ultimate burden of persuasion rests with the party that must convince the trier of fact at the end of a trial as to the outcome determinative issue - in this instance, the "real" motivation for the discipline. (citations omitted) Under the Board's *Wright Line* test, the General Counsel has to demonstrate only that the unlawful motive was a "motivating factor" in the discipline, not that the unlawful reason was the "but for" cause. If the unlawful "motivating factor" element is shown and the employer then fails to prove by a preponderance of the evidence that its independent lawful motive was the "but for" cause, then the Board would find the employer violated the Act . . . Pursuant to [the Board decision] *Wright*

> *Line*, any case resting in equipoise would result in finding the employer guilty of an unfair labor practice, a result plainly at odds with the statute."

(citations omitted) *Id.* at 1359-61.[4]

The *N.Y.U. Medical* decision thus confirms the stance taken by the Respondent, as well as by the First Circuit court, that the employer need not carry the overall burden of proving itself "innocent" of violating the statute. Resp. Brief 20, 22, 21 n.13; *NLRB v. Transportation Management Corp.*, 674 F.2d 130, 132 (1st Cir. 1982) (Breyer, J. concurring). Rather, the employer need only produce evidence that its reasons for the discharge or discipline were motivated by lawful management objectives (Resp. Brief 5, 22).

Turning to the legislative history of the Act, the Second Circuit court also provided fresh insight into the Congressional intent behind the enactment of Section 10(c). Going beyond the plain meaning of the statute, the court found that the House committee members in 1947 were especially concerned that the Board act upon a preponderance of the evidence in proving unfair labor practice violations. Slip. op. at 1361-63.

> Members of the House apparently wished to prod the Board to articulate its reasons for reinstating an employee and thus ensure that meaningful appellate review would be possible. In too many cases, the Board had presented its conclusion of discriminatory discharge without analyzing why the illegitimate motive was the *real* reason for the discipline. (citations omitted) *Id.* at 1362; *see also* Resp. Brief at 21, n.12.

Moreover, in accordance with the Respondent's position, the Second Circuit court discredited the Board's reliance on the

---

[4] Finding the employer liable for an unfair labor practice any time the evidence rests in equipoise, appears to ressurect the "in part" test, a test presumably abrogated by the Board in its own *Wright Line* decision. 251 N.L.R.B. 1083, 1089 (1980) ("but for" test adopted to alleviate "intolerable confusion in Section 8(a)(3) area); *see* Brief of Council on Labor Law Equality, Amicus Curiae at 22; Resp. Brief at 7 (description of "in part" test).

Taft-Pepper colloquy on Section 10(c) as support for the proposition that the burden of proof shifts to the employer in dual motive actions. Slip. op. at 1363-1367; 1368 n.13; *see* Resp. Brief 23-25; 24 n.15. *But see Zurn Industries v. NLRB*, 680 F.2d 683, 693 (7th Cir. 1982). Although the Board has repeatedly relied upon Senator Taft's comment that the "employer has to make the proof" in support of its burden-shifting analysis (Pet. Brief 20-22, 21 n.11), it is not clear that Congress intended to shift the burden of persuasion onto the employer.

> Although the debates are by no means conclusive, no clear intent to shift the ultimate burden of persuasion is manifest. Senator Taft's comment that "the employer has to make the proof" does not at all suggest that the burden of persuasion shifts; if anything, it may be understood to discuss something more akin to a burden of production. That reading is plausible in view of the Senator's next statement, "[t]he Board will have to determine - and it always has - whether the discharge was for cause or for union activity, and the preponderance of the evidence will determine that question." (citations omitted) Under Senator Taft's view, after the General Counsel's prima facie showing of unlawful motivation and the employer's countervailing demonstration of legitimate motive, the Board must determine the real reason by a preponderance of the evidence . . .

Slip. op. at 1367; *see also* Resp. Brief 26 n.15.

The court then concluded that "the legislative history does not so undermine the plain language of § 10(c) as to allow the Board to shift the burden of persuasion to the employer." *Id.* at 1367-68.[5]

---

[5] In a footnote, the court weakened the Board's reliance on the *Mt. Healthy* decision by distinguishing it as a decision of constitutional dimension. Slip. op. at 1367-68 n.12. The court also referred to the *Burdine* case and the Title VII area in support of its position that the burden of persuasion should not shift to the employer. *Id.*

Conclusion.

Based upon the reasoning of the Second Circuit court's *N.Y.U. Medical* decision, the plain language of Section 10(c) prohibits shifting the burden of persuasion to the employer in dual motive actions under Section 8(a)(3). Pursuant to its recent decision, the Second Circuit court now joins the First, Third, and Seventh Circuit Courts of Appeals in rejecting any effort by the Board to impose a burden of persuasion on the employer. Instead, the "General Counsel [must] prove each unfair labor practice by a preponderance of the evidence." Slip. op. at 1357, *citing NLRB v. Webb Ford Inc.*, 689 F.2d 733, 739 (7th Cir. 1982); *Behring International, Inc. v. NLRB*, 675 F.2d 83, 87-91 (3d Cir. 1982); *NLRB v. Wright Line, a Div. of Wright Line, Inc.*, 662 F.2d 899, 902-05 (1st Cir. 1981).

This Court has recently stated that: "going behind the plain language of a statute in search of a possible contrary Congressional intent is 'a step to be taken cautiously' even under the best of circumstances." *American Tobacco Co. v. Patterson*, ____ U.S. ____, 102 S.Ct. 1534, 1540 (1982) citing *Piper v. Chris Craft Industries, Inc.*, 430 U.S. 1, 26 (1977).[6] Since the Petitioner's *Wright Line* test is at odds with the plain language of Section 10(c), the Court should reject the Petitioner's construction of the statute. This result mandates a

[6] Justice Frankfurter has cautioned: "We must be wary against interpolating our notions of policy in the interstices of legislative provisions." *Scripps-Howard Radio v. F.C.C.*, 316 U.S. 4, 11 (1942). By analogy, the Petitioner has erred in its burden of proof test by injecting its own notions of NLRA policy into the "interstices" of Section 10(c).

finding by this Court that the burden of persuasion never shifts from the General Counsel to the employer in dual motive actions arising under the Act.

Respectfully submitted,

MARTIN AMES,
(Counsel of Record)
7 Fletcher Street,
P.O. Box 251,
Chelmsford, Massachusetts 01824.
(617) 256-8115